APR 6 2001 (11)

No. 00-843

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IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, AT&T WIRELESS SERVICES, INC., TELIGENT, INC., WINSTAR COMMUNICATIONS, INC., WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, AND XO COMMUNICATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

28 pp

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QUESTION PRESENTED

The Wireless Industry *Amici* seek to address the second of the two issues presented before the Court, which is:

> Whether those provisions of the Pole Attachments Act apply to attachments by providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services.

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PRELIMINARY STATEMENT[1]

The Association for Local Telecommunications Services, AT&T Wireless Services, Inc., Teligent, Inc., Winstar

[1] In accordance with this Court's Rule 37.6, the Wireless Industry *Amici* respectfully state that this brief was authored entirely by counsel for the named *amici curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

Communications, Inc., Wireless Communications Association International, and XO Communications, Inc. (the "Wireless Industry *Amici*") respectfully submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court, in support of Petitioners Federal Communications Commission and United States of America.[2]

INTEREST OF THE WIRELESS INDUSTRY *AMICI*

The Wireless Industry *Amici* are companies and trade associations with diverse interests in the wireless telecommunications industry. They are joined by a common concern that the Eleventh Circuit's decision at issue here could lead to substantial new impediments to the ability of companies using wireless technology to compete effectively in the telecommunications industry. The Wireless Industry *Amici* have extensive relevant industry knowledge that is germane to the issues presented in this case and has not already been brought to this Court's attention.

The Association for Local Telecommunications Services is the leading national industry association whose mission is to promote facilities-based local telecommunications competition. The organization represents companies that build, own, and operate competitive local telecommunications networks.

AT&T Wireless Services, Inc., a subsidiary of AT&T Corp., is in the business of providing both mobile and fixed wireless telecommunications services. AT&T Wireless uses poles, ducts, conduits, and rights-of-way owned and controlled by utilities in order to provide these services. It therefore has a direct and substantial interest in this case.

Teligent, Inc. is a fixed wireless carrier licensed by the FCC to provide voice and data telecommunications service via the 24 GHz frequency band and other common carrier

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[2] In accordance with this Court's Rule 37.3(a), this brief is accompanied by the written consent of all parties.

microwave frequency bands. Teligent provides its services, including local telephone service, primarily by deploying fixed wireless broadband networks in numerous cities throughout the United States.

Winstar Communications, Inc. is a national facilities-based broadband service company offering local and long distance telecommunications, high-speed Internet, and data services using, among other technologies, its fixed wireless systems that operate in the 38.6-40.0 GHz, Local Multipoint Distribution Service, and 18 GHz bands. As the result of a spectrum auction that concluded in the acquisition of additional licenses in October 2000, Winstar now holds nearly ubiquitous broadband spectrum coverage throughout the contiguous United States, Alaska and Hawaii. It currently offers wireless links that operate at up to 200 megabits per second.

The Wireless Communications Association International is the primary trade association worldwide for companies that provide broadband telecommunications services using fixed (as opposed to mobile) wireless technology. Its 460 members on six continents include the vast majority of the world's leading fixed wireless licensees and manufacturers of fixed wireless equipment.

XO Communications, Inc. operates high capacity, fiber optic and wireless networks in the United States and internationally providing local, long distance, data and enhanced telecommunications services. XO's LMDS licenses and 39 GHz licenses cover substantially all of the largest markets in the United States. The company plans to use wireless technology to connect customers directly to its local fiber optic and inter-city networks.

This case involves issues of special importance to telecommunications carriers that use wireless technologies to provide their telecommunications services. The opinion of

the Eleventh Circuit can be interpreted literally to deny the statutory right of at least some wireless telecommunications carriers to attach facilities to utility poles on regulated terms and conditions. If allowed to stand, the decision will suggest to the public utilities that control access to poles, ducts, conduits, and rights-of-way that they may exclude telecommunications carriers employing wireless technology from access on reasonable terms to the full range of facilities (poles, ducts, conduits, and rights-of-way) to which Congress intended all such telecommunications carriers to have access.

As active participants in the deployment of wireless technology, the Wireless Industry *Amici* are in a position to be particularly helpful to the Court in explaining the Eleventh Circuit panel majority's erroneous factual assumptions and highlighting the substantial and important negative consequences that may befall telecommunications competition if the Eleventh Circuit's decision is permitted to stand.

STATEMENT OF THE CASE

The Wireless Industry *Amici* adopt the statement of the case set out in Petitioners' Brief and offer the following supplemental points as predicates for the argument that follows.

The amendments to Section 224, granting all telecommunications carriers (other than the monopoly incumbent local exchange carriers) a right of access to utility poles, ducts, conduits, and rights-of-way on regulated terms and conditions, were enacted as part of the sweeping revision of the Communications Act of 1934 that Congress effected in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"). Through enactment of the 1996 Act, Congress sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies

and services to all Americans by opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 1 (1996).

The FCC conducted a rulemaking to implement the 1996 amendments to Section 224, in the course of which the utilities argued, *inter alia*, that telecommunications carriers using wireless technology were not among the telecommunications carriers entitled to regulated access to their poles, ducts, conduits, and rights-of-way. After review and consideration of numerous comments supporting and refuting this position, the FCC rejected the utilities' arguments and concluded that the plain wording of the statute mandated that telecommunications carriers using wireless technology are entitled to the benefits and protections of Section 224. *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6798 (1998) (the "*Order*").

On review, a divided panel of the Eleventh Circuit declined to accord deference to the FCC's construction and implementation of the amendments to Section 224 on the grounds that Section 224, as amended, unambiguously expressed a congressional intent to deny the benefits and protections of Section 224 to at least some telecommunications carriers employing wireless facilities. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1273 n.21 (11th Cir. 2000), *cert. granted*, 121 S. Ct. 879 (2001) ("*Gulf Power II*"). The panel majority discerned the unambiguously expressed intent of Congress not from the express language of the statute but rather by deducing a "negative implication" from examination of two distinct parts of the statute. *Id.* at 1274. The panel majority then advanced a series of erroneous factual assertions regarding the nature and needs of telecommunications carriers using wireless technologies that are neither supported by the FCC's decision nor compelled by

the administrative record before the FCC, apparently to buttress the conclusion that Congress intended to exclude such carriers from the benefits and protections of the amendments to Section 224. *Id. at 1275.*

SUMMARY OF ARGUMENT

The FCC correctly determined that Congress intended all competitive telecommunications carriers, regardless of the technologies they employ in providing their services, to enjoy a right of access to the poles, ducts, conduits, and rights-of-way of traditional utilities on regulated terms and conditions. This necessary determination regarding the scope of Section 224 substantially enhanced the potential for competition by and among telecommunications carriers using a variety of technologies including, in particular, wireless technologies. The Eleventh Circuit's reversal of the FCC's decision creates tremendous uncertainty for telecommunications carriers that use wireless technology about the extent to which they enjoy the benefits and protections of Section 224 solely on the basis of the technology they use, a result that threatens to undermine the intermodal competition that Congress intended the FCC to encourage. Telecommunications carriers that utilize wireless technology need reasonable and nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way, and the Eleventh Circuit opinion will create substantial new obstacles to obtaining such access without harmful delay and expense. Competition and the consumer benefits it brings, both clear goals of the 1996 Act, are likely to be constrained or entirely subverted by those new obstacles.

The Eleventh Circuit's decision to exclude wireless telecommunications facilities from the attachments covered by Section 224 of the Communications Act is in conflict with the plain language of the statute. Section 224 does not limit its application only to those utility facilities that can be shown

to constitute bottleneck facilities. In addition, the panel majority's exclusion of wireless telecommunications carriers from the term "telecommunications carrier" in Section 224 will necessarily affect not only the scope of Section 224, but also the application of all statutory provisions that incorporate that statutorily defined term. This effect occurs because Section 224(a)(5) explicitly states that the term "telecommunications carrier" for purposes of Section 224 has the same meaning as the term is used in all other provisions of the Communications Act, with the single exception that incumbent local exchange carriers are excluded from the definition for purposes of Section 224. 47 U.S.C. § 224(a)(5). A proper plain meaning analysis is sufficient to demonstrate the error in the Eleventh Circuit's decision. To the extent, however, there is discerned some ambiguity in the statutory language, the Eleventh Circuit's decision is in conflict with the opinion of the expert agency to which the court failed to afford the requisite *Chevron* deference.

Finally, the Eleventh Circuit panel majority premised its legal conclusion upon two incorrect and independently derived factual assumptions. First, by erroneously concluding that only one type of mobile wireless technology constitutes the universe of wireless telecommunications services affected by its decision, the panel majority failed to consider the wide variety of wireless telecommunications technologies currently in use or being developed. Second, the panel majority incorrectly assumed away the critical need for attaching wireless telecommunications facilities to utility poles, ducts, conduits, and rights-of-way. When the full range of possible wireless services and their needs for access to utility poles, ducts, conduits, and rights-of-way are taken into account, the disparity between Congress' intent and the Eleventh Circuit's construction of the 1996 amendments to Section 224 becomes especially clear, as does the urgent need for reversal by this Court.

For these reasons, the Wireless Industry *Amici* respectfully advocate reversal of the Eleventh Circuit's decision.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S ERROR OF LEGAL ANALYSIS COULD SUBSTANTIALLY IMPAIR COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY BY FIRMS EMPLOYING WIRELESS TECHNOLOGY, IN CONTRAVENTION OF THE CONGRESSIONAL PURPOSE TO PROMOTE SUCH COMPETITION THROUGH THE 1996 ACT.

The statutory language and the legislative history of the 1996 Act contain numerous references that support the conclusion that Congress intended in the 1996 Act to promote competition and innovation in telecommunications services and specifically sought to eliminate discrimination among the various telecommunications technologies. Those intentions are evidenced by the 1996 Act's definition of "telecommunications service" to include the provision of such services "regardless of the facilities used." 47 U.S.C. § 153(46). Multiple varieties of wireless services have become available to users from a wide array of competing carriers. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 F.C.C.R. 20,913, 20,932 (2000) ("*Advanced Services Second Report*") ("Wireless services and technologies have the potential to deliver high-speed services to residential, rural, and otherwise underserved areas and to increase competition in the last mile in the near future."); *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to*

Commercial Mobile Services, 15 F.C.C.R. 17,660, 17,682 (2000) ("Increasing [Minutes Of Use] . . . may also indicate that mobile telephony is moving away from just complementing existing wireline voice service and towards competing directly with it.").

The Eleventh Circuit properly recognized that poles, ducts, conduits, and rights-of-way are essential facilities. *Gulf Power II*, 208 F.3d at 1266. The duplication of utility pole and conduit networks is an economically infeasible enterprise. *See* S. Rep. No. 95-580, at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 121. Moreover, as the Eleventh Circuit recognized, attempts to construct or acquire new poles, ducts, conduits, and rights-of-way are impeded or prevented not only by economic barriers, but also by many State and local governments that, for a variety of reasons, limit the ability of cable operators and telecommunications carriers to obtain necessary rights-of-way or to construct transmission facilities that duplicate existing utility facilities. *Gulf Power II*, 208 F.3d at 1266. Just as with wireline carriers, wireless carriers routinely attach their equipment to utility facilities, a practice often necessitated by a lack of available alternatives due both to these government-imposed limitations and to economic realities. As a result, the number of transmission routes and facilities remains limited, and providers of wireless services must therefore depend upon access to the utilities' poles, ducts, conduits, and rights-of-way to provide the congressionally-desired competition.

The Eleventh Circuit's denial of the benefits and protections of Section 224 for a large sector of the telecommunications industry defeats Congress' purpose and risks jeopardizing telecommunications competition. The consequent harm that may befall the wireless telecommunications industry as a result of the Eleventh Circuit's erroneous legal analysis compels the Court's reversal of the *Gulf Power II* decision.

A. The Plain Language Of Section 224 Provides No Basis For Excluding Wireless Telecommunications Carriers From The Communications Act's Definition Of "Telecommunications Carrier."

Telecommunications carriers employing exclusively wireless facilities and a combination of wireless and wireline facilities are encompassed by the plain language of Section 224 and are entitled to its benefits. The definitions in Section 3 govern Section 224, as they do the other provisions encompassed in the Communications Act of 1934, as amended. *See* 47 U.S.C. § 153. "Telecommunications carrier" is therein defined to include "any provider of telecommunications services." 47 U.S.C. § 153(44). In turn, "telecommunications service" is defined as the offering of telecommunications "regardless of the facilities used." 47 U.S.C. § 153(46). A proper plain meaning analysis would concern itself with the scope of the foregoing terms. Such an analysis also would recognize that where Congress sought to exclude entities from the defined term "telecommunications carrier" for purposes of Section 224, it did so. *See* 47 U.S.C. § 224(a)(5) (exclusion of incumbent local exchange carriers from the term "telecommunications carrier"). The Eleventh Circuit panel majority failed to pursue a proper plain meaning analysis.

Moreover, Congress itself determined that utility poles, ducts, conduits, and rights-of-way are facilities to which all telecommunications carriers, including those that employ wireless technology, must obtain reasonable and nondiscriminatory access. Without support in the statute, the Eleventh Circuit panel majority limited the range of utility facilities subject to this access requirement, asserting that "utility poles are not bottleneck facilities for wireless systems. Because they are not . . . the act does not provide the FCC with authority to regulate wireless carriers." *Gulf*

Power II, 208 F.3d at 1275. The notable absence of the term "bottleneck facility" in Section 224 indicates that this category of facilities did not comprise the universe of intended coverage by the statute. Nothing in the plain language of the statute suggests that wireless telecommunications carriers, as distinct from wireline telecommunications carriers, must demonstrate that a utility's facility operates as a bottleneck before availing themselves of Section 224's provision of access.

More broadly, nothing in the language, history, or purpose of the 1996 Act can be understood to express in any way a congressional intent to favor any particular technology over another in the competition that Congress sought to encourage. However, the Eleventh Circuit did just that. The *Gulf Power II* decision could be misconstrued in a manner that would competitively disadvantage telecommunications carriers using wireless telecommunications technologies vis-à-vis their predominantly wireline counterparts, and would impair the provision of intermodal competitive telecommunications services envisioned—indeed, promoted—by the 1996 Act. For example, if the utilities were to rely upon the Eleventh Circuit's conclusion as a basis to deny telecommunications carriers that rely primarily on fixed and mobile wireless facilities the Section 224 access that is granted their wireline competitors (sometimes using exactly the same space), wireless telecommunications carriers would be placed at a significant competitive disadvantage.

B. The Eleventh Circuit Pursued An Inquiry Into The Intent Of Congress Without Affording The FCC The Requisite *Chevron* Deference.

Courts traditionally afford deference to an agency's interpretations of its organic statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). However, the Eleventh Circuit failed to defer appropriately to FCC factual determinations within the agency's area of

special expertise. Although it characterized its holding as one based on the plain language of Section 224, the Eleventh Circuit nonetheless sought to ascertain the intent of Congress. In doing so, it assumed away the very foundation of Congress' intent in enacting Section 224—that a variety of technologies should have the benefit of access to existing public utility poles, ducts, conduits, and rights-of-way to the extent they are willing to pay a just and reasonable rate for such access. *See* H. Rep. No. 104-204, at 91 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58 ("The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy. Section 105 is intended to remedy the inequity for pole attachments among providers of telecommunications services."). The assumed facts were not found by the FCC and appear in part in the FCC's Order only in the course of a description of an argument that the agency ultimately rejected. *Order*, 13 F.C.C.R. at 6799 (FCC rejecting the utility assertion that differences between some wireless equipment and wireline equipment would render application of the FCC's pole attachment price formula to wireless telecommunications equipment difficult as a practical matter).

Judicial deference to agency discretion is premised, in part, upon the agency's unique expertise in complicated arenas of regulation. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (Congress' deliberate adoption of the deferential arbitrary and capricious standard frees reviewing courts from the task of weighing the evidence and affords proper respect to the expertise of the agency). The scope of review under this standard is narrow and "[a] court is not empowered to substitute its judgment for that of the agency." *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 803 (1978) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Of particular relevance to the instant matter, this Court has admonished that when an agency makes determinations "within its area of special

expertise, at the frontiers of science[,] . . . a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Hence, in contravention of the well-established judicial policy, the Eleventh Circuit panel majority failed to defer to the FCC's expertise in matters of telecommunications.

II. IN AN EFFORT TO INDEPENDENTLY ASCERTAIN THE INTENT OF CONGRESS, THE PANEL MAJORITY RELIED UPON ERRONEOUS AND *SUA SPONTE* FACTUAL CONCLUSIONS ABOUT THE NATURE AND NEEDS OF WIRELESS TELECOMMUNICATIONS TECHNOLOGIES.

The Eleventh Circuit's premise that Congress did not intend to include wireless telecommunications carriers within the scope of Section 224 derived from a set of misunderstandings about the actual nature of wireless telecommunications networks as well as their critical need for access to utility facilities.

A. The Eleventh Circuit Panel Majority Failed To Recognize The Use By Wireless Telecommunications Networks Of Wireline Facilities And Erroneously Contemplated A Fluid, Dynamic Technology That Does Not Rely On A Particular Location For Equipment Installation.

The Eleventh Circuit's unsupported factual assertion that "Petitioners' poles are not bottleneck facilities for wireless carriers" was erroneous. *Gulf Power II*, 208 F.3d at 1275. The panel majority's decision went on to assert that:

> it is highly questionable whether there are any bottleneck facilities for wireless systems. What is beyond question

> is that utility poles are not bottleneck facilities for wireless systems. Because they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers.

Id. The opinion also asserts without reference to the underlying factual record that "[m]ost of this [wireless] equipment can be placed on any tall building, and the whole set-up requires more physical space than a wireline system." *Id.*

Simply put, the factual assumptions that serve as the foundation of the Eleventh Circuit's opinion are flawed and reflect a substantial misunderstanding concerning the nature of wireless technologies. The panel majority misunderstood the common industry practice of referring to "wireline" and "wireless" carriers. In industry practice and as understood by the FCC, these terms refer to a given carrier's predominant technology, and do not imply that a given carrier relies exclusively on wireless or wireline technology. For example, wireless telecommunications systems frequently make extensive use of wireline facilities for traffic backhaul, redundancy, intermodal operations, in-building transport, and other purposes. In contrast, the Eleventh Circuit panel majority appears to be unaware of the frequent combination of technologies in a single network. *See, e.g., Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, Form 10Q, for the quarterly period ended September 30, 2000, Commission file number: 0-30900, XO Communications, Inc., at 18 ("In some cases, we will make this direct connection by constructing a new fiber optic extension from our network to the customer's premises. In other cases, using our fixed wireless spectrum, we will deploy a high-bandwidth wireless connection between an antenna on the roof of the customer's premises and an antenna attached to our fiber rings."), *available at*

http://www.sec.gov/Archives/edgar/data/1111634/000095013300004526/0000950133-00-004526-index.htm. The artificial "wireline" and "wireless" distinction that the Eleventh Circuit opinion interposes upon the telecommunications industry, in conjunction with its resulting conclusion, will impose non-market-based constraints against the use of wireless technologies in telecommunications networks.

The Eleventh Circuit also described a method of how "wireless systems" operate that is not only uncited to the record before the court but also incorrect. In explaining the differences between wireline and wireless systems, the court stated that "wireless networks . . . transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions." *Gulf Power II*, 208 F.3d at 1275. This depiction arguably is descriptive of certain cellular and PCS telephone networks but does not describe accurately the facilities used by a significant number of other providers of materially different wireless services. Technologically, the court's description was unduly narrow and untrue for fixed wireless systems. *Advanced Services Second Report*, 15 F.C.C.R. at 20,934 ("[O]nce a wireless provider has installed its antenna in an area, it completes the last-mile connection by installing an on-premises transceiver only for those customers who have actually subscribed to its service."). For mobile wireless telecommunications services, the Eleventh Circuit panel majority presumes incorrectly that facilities other than poles will be available in the exact location needed to ensure signal coverage.

B. Wireless Telecommunications Carriers Must Be Permitted To Attach To Utility Facilities In Order To Construct And Operate Their Networks.

The panel majority's *sua sponte* factual conclusion that "utility poles are not bottleneck facilities for wireless systems," *Gulf Power II*, 208 F.3d at 1275, is plainly

incorrect. As a factual matter, many wireless facilities cannot be placed on simply any building, but instead must be placed on or immediately adjacent to the particular buildings to which they are providing service in order to serve the customer residing within that building. For example, a fixed wireless carrier must install wires through a building that connect its rooftop wireless antenna to its in-building customer using utility ducts, conduits, and rights-of-way. *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-57, 2000 FCC LEXIS 5672, at *153-*54 (Oct. 25, 2000) ("In order for a customer to receive fixed wireless service at home or at the office, that customer must be able to place an antenna at the fixed site .... [T]he inability of a customer to place an antenna at the customer's fixed site will result, with few exceptions, in the denial of fixed wireless service to that customer. . . ."). Even for cellular and PCS services in unpopulated areas, utility transmission towers may be the only structures available for antenna siting.

Wireless telecommunications carriers overcome these barriers to network construction by placing their wireless and wireline equipment on or in utility facilities. In many cases, wireless telecommunications facilities are connected to a larger network using wireline facilities that must be located on utility facilities. *See Federal Communications Comm'n v. Gulf Power Co.*, No. 00-843, Petition for a Writ of Certiorari, at 21. Moreover, it is of general knowledge in the industry

that wireless carriers also attach purely wireless equipment to utility facilities. *See, e.g., New York Power Authority Leases Towers to Omnipoint to Install PCS Antennas*, ENERGY SERVS. & TELCOM REP., Dec. 5, 1996, at 4 (noting agreements pursuant to which the New York Power Authority permits mobile wireless carriers OmniPoint and Sprint to install their antennas on the electric utility's transmission towers). This practice is so common that Respondent Duke Energy Corp. established a subsidiary devoted entirely to marketing its towers to wireless telecommunications carriers "to help meet the growing need for antenna sites," *see* Duke Communications Services News Release, July 24, 1998, *available at* http://www.duke-energy.com/decorp/content-/newscenter/newsreleases/1998/jul/19980724, and, prior to the adoption of the *Order*, companies had been established for the purpose of manufacturing devices designed to affix wireless attachments to utility poles, *see* Roy Moore, *Sharing the Load With Utilities*, WBST, June 1997, at 40. Even the electric utilities themselves utilize their own facilities to support their own retail wireless operations. *See, e.g.*, Southern Company, *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 1999 (10K)*, at I-3 (filed Mar. 27, 2000) (describing the company's digital wireless retail operations in the Southeast United States). In an article released prior to enactment of the 1996 Act, a prominent electric utility industry trade journal describes the practice of attaching wireless antennae to Baltimore Gas & Electric Company's powerline transmission structures (poles, for purposes of Section 224) as a response to moratoria on new tower construction imposed by local governments. *See Transmission Structures Pull Double Duty*, UTC JOURNAL, Jan. 1997, at 25. In an equally prominent wireless telecommunications trade journal, it was reported that Respondent Texas Utilities had invested in PCS wireless operator PrimeCo and had permitted the installation of

PrimeCo's wireless equipment on Texas Utilities' electric transmission towers. *See PCS PrimeCo Makes Call Using CDMA Technology on 1900 MHz Spectrum*, RADIO COMM. REP., Nov. 6, 1995, at 71. Respondent Texas Utilities reported to its shareholders that the rapid construction of its PCS affiliate's network was attributable to the carrier's ability to locate many of its antenna structures on the electric utility's transmission towers. See Texas Utilities Company, 1996 Annual Report 3 (1997) (LEXIS, EdgarPlus).

Given these widely publicized industry practices, the FCC properly rejected the utilities' efforts to limit their obligations under the statute on the artificial basis of the technology predominantly employed by a telecommunications service provider. As the expert agency, the FCC knew that, while individual carriers may typically depend at any given time more heavily on one form of technology than another, many carriers use a combination of wireline and wireless facilities to provide their services, both of which require attachment to utility facilities. *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Teligent, L.L.C., at 9-10 (filed Sept. 26, 1997) (explaining the wireline and wireless components of a fixed wireless network and demonstrating the need for fixed wireless carrier access to utility rights-of-way). The record in a related FCC proceeding addressing the same statutory provision and this precise issue confirms that the FCC also was aware of the industry practice of mobile wireless carriers attaching antennae to utility poles for years prior to adoption of the *Order*. *See, e.g., Letter from Mr. Joseph M. Sandri, Jr., Winstar Telecommunications Group to Mr. William F. Caton, Secretary, Federal Communications Commission* of 5/13/97, CC Docket No. 96-98 (submitting, *inter alia*, a Houston Chronicle report in November 1996 that more than 70 percent

of mobile wireless carrier PrimeCo's antennae were located on existing structures, "mostly on Houston Lighting & Power transmission towers"). Consequently, the FCC read the plain language of Sections 224 and 153(46) to mean that the Section 224 benefits should be available to all telecommunications carriers regardless of the technologies employed by any given carrier. *Order*, 13 F.C.C.R. at 6798.

The Eleventh Circuit panel majority erred by abandoning a plain meaning analysis and pursuing an inquiry into the intent of Congress while simultaneously failing to afford the FCC the requisite level of deference. The harm of this error was compounded by the mistaken factual conclusions it independently derived upon which its congressional intent conclusions were premised. Even if the Eleventh Circuit were correct in its apparent conclusion that the FCC's decision was not adequately grounded in the facts, the proper course of action would have been to remand the matter back to the agency for further factual inquiry. *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) ("If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.'") (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973)). Instead, the Eleventh Circuit erroneously assumed the role that Congress has assigned to the FCC and reached its own factual conclusions that are incompatible with those underlying the FCC's decision and unanchored in the record.

CONCLUSION

For the foregoing reasons, reversal by this Court of the Eleventh Circuit's *Gulf Power II* decision is warranted because of the severe harm to congressionally-intended telecommunications competition that will result from the panel majority's legal and factual errors.

Respectfully submitted,

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